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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 530

NELLIE FAYE BEAMER, ADMINISTRATRIX OF THE ESTATE OF ROBERT P. BEAMER, DECEASED,

Petitioner,

versus

THE VIRGINIAN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

ROBERT J. ASHWORTH,
DAVID D. ASHWORTH,
CARL C. SANDERS,
Beckley, West Virginia;
J. L. DILLOW,
Pearisburg, Virginia,
Counsel for Petitioner.

ASHWORTH & SANDERS,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Your petitioner, Nellie Faye Beamer, Administratrix of the Estate of Robert P. Beamer, deceased, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Supreme Court of the State of Virginia, being the highest Court in said State, in the above entitled action, the opinion and decision of said Court having been rendered and filed on the 14th day of June, 1943, and a petition and re-hearing which was after being entertained and considered by said Court, denied October 14, 1943; by which said decision the said Court affirmed

the judgment of the Circuit Court of Giles County, Virginia, in setting aside a verdict of a jury in favor of said Administratrix for $10,000.00.

The Circuit Court of Giles County did not take cognizance of the 1939 Amendment to the Federal Employers Liability Act, although plaintiff's decedent was injured and died on the 26th day of July, 1940, and set aside the verdict of the jury upon the sole ground that the deceased assumed the risk of employment as a matter of law. The Supreme Court of Virginia affirmed the decision of the Circuit Court, but held that "the other allegations of negligence were either not sustained by the evidence, or were not the proximate cause of the death of Mr. Beamer."

II.

The jurisdiction of this Court is invoked under Title 28, Chapter 9, Section 344, U. S. C. A. (Judicial Code, Section 237, amended), and this action was brought under Federal Employers Liability Act, U. S. C. A. Title 45, Sections 51 to 59, inclusive.

A question for jury determination is presented as to "negligence" when it appears from the evidence that an employee, subject to the benefits of the "Federal Employers Liability Act", is required to work at a place in a power plant replacing an expansion joint next to the ceiling of a basement, 30 feet high, where the temperature is 132° F., where the pipes are dusty and dirty and too hot to touch, where there is no manual or mechanical ventilating system except an air hose not feasible to use because of the accumulation of dust and dirt, where the place of work is not inspected and has no means of determining the condition of the air and heat, and, where such employee is required to finish the task before a certain time, dies as a result of working in such excessive heat.

It is for the jury to say, under such circumstances, whether or not the employer has performed his duty to use reasonable care in furnishing his employee with a safe place to work.

Evidence of general custom of a trade or business engaged in similar work under like circumstances is never conclusive but is proper evidence to be considered along with all the other evidence, facts and circumstances in the case as to whether or not the defendant is guilty of negligence.

The jury decided that the defendant was negligent; the trial Judge who heard the case and saw the witnesses decided the defendant was negligent, but set aside the verdict on the grounds that the deceased assumed the risk. A risk can only be assumed where there is some negligence on the part of somebody. The Supreme Court of Virginia affirmed the judgment of the lower Court in setting aside the verdict of the jury on the theory of non-negligence. Such decision is not in accord with the applicable decision of the Supreme Court of the United States. The plaintiff has been denied her rights under the Federal Employers Liability Act. The decision of the Supreme Court of Appeals of Virginia in this case, not being in accord with the decision of the Supreme Court of the United States, will create a diversity of decisions in the lower Courts and will thereby seriously affect the administration of the law in other similar cases.

III.

Summary and Brief Statement.

Nellie Faye Beamer, Administratrix, brought an action against The Virginian Railway Company, a Corporation, for the sum of $50,000.00 damages, based upon the wrongful death of plaintiff's decedent, Robert P. Beamer, an employee of The Virginian Railway Company, engaged in the

business of Interstate Commerce, and covered under the provisions of Federal Employers Liability Act.

The jury returned a verdict in favor of the plaintiff for the sum of $10,000.00. The Judge of the Circuit Court of Giles County, Virginia, set aside the verdict of the jury on the ground that the plaintiff's decedent assumed the risk of his employment, as disclosed by the evidence, as a matter of law, and entered up judgment in favor of the defendant; the Supreme Court of Virginia affirmed this judgment on the grounds of non-negligence.

Robert P. Beamer, an employee of The Virginian Railway Company, at its power plant at Narrows, Virginia, died from working in extreme heat on July 26, 1940, while on duty at the plant. Immediately prior to Mr. Beamer's death, and on the morning that he went to work, he was in sound, perfect physical health. He fully enjoyed life, romped and played with his six children, four of whom were adults, and never missed a day's work except on occasions of sickness in his family.

Mr. Beamer had been employed as a steam-fitter for The Virginian Railway Company at its power plant at Narrows, Virginia, for approximately fifteen years. Mr. Cleve Bowser, the General Foreman over the entire plant, gave instructions to Mr. Beamer as to where and what work he should do and Mr. Beamer would go ahead and do it.

Description of Power Plant and General Working Conditions.

The Virginian Railway Company operated this power plant at Narrows, Virginia, for the purpose of generating electricity to haul heavy loads of coal in Interstate Commerce between Mullens, West Virginia, and Roanoke, Virginia. This electricity is generated through four turbines heated with steam. These turbines are located in a large building approximately eighty feet wide and one hundred

fifty feet long. There are two floors, the basement floor and the so-called turbine floor. These turbines are set in the turbine floor, and this floor is approximately thirty feet above the basement floor. The turbine floor is about four or five feet above ground level. This leaves approximately twenty-six feet of the basement below ground level. There are no outside windows to this basement and no mechanical ventilating system. The upstairs room, spoken of as the turbine floor room, has many windows on its sides and air ventilators in the top. There are openings through the floor of the turbine room between turbines Nos. 1 and 2, and between turbines Nos. 3 and 4. There was a thermometer on the turbine floor which gave the temperature of that room at all times, but there was no thermometer in the basement room. No temperature reading was ever taken in the basement floor room and in particular no temperature was ever taken at the place where Mr. Beamer was working immediately prior to his death. Mr. Beamer and no other person had ever done this kind of work for a period of two hours at this particular place. A great amount of dust accumulated on the pipes and other parts of the machinery in the basement room and the pipes and turbines were dusted about once every two years. The temperature of the basement room, at the place where the deceased was required to work at hard physical labor from about one-thirty, p. m., to three-thirty, p. m., was 132 degrees Fahrenheit, and there was very little, if any, circulation of air.

Nature of Work the Deceased Was Doing Immediately Prior to His Death.

Mr. Bowser, General Foreman, instructed Mr. Beamer that turbine No. 1 was not functioning properly and directed him to go over turbine No. 1 on the day of the death of Mr. Beamer.

Shortly after noon of that day, Mr. Beamer reported to Mr. Bowser that he had found a large expansion joint in the heater line broken in turbine. Mr. Beamer stated to Mr. Bowser that if he repaired that joint he would have to work overtime, that it would take him longer than four o'clock that afternoon to finish it. Employees were not permitted to work overtime without the consent of their Foreman. Mr. Bowser directed Mr. Beamer to go into the storeroom and get a new joint because by using the new joint he could finish it by four o'clock. Mr. Beamer told his helper, Mr. Wimmer, that he had to finish the expansion joint by four o'clock. This expansion joint which was being replaced was located next to the ceiling of the basement floor. Mr. Wimmer got to this expansion joint by going through a panel about twenty-eight inches by fifty inches on turbine No. 1, but Mr. Beamer, being a large man weighing approximately two hundred twenty pounds, went down the elevator, up a stairway and climbed up to the pipes on a small platform located next to the ceiling to do this work. An air hose was available for the use of Mr. Beamer and Mr. Wimmer, but was not used because of the large accumulation of dust. The pipes were so hot that you could not lay your hand on them. There was very little circulation of air or no ventilation at the place Mr. Beamer and Mr. Wimmer were required to work. The temperature was 132 degrees Fahrenheit. They continued to work under these conditions in putting in this new expansion joint for approximately two hours. They went outside on two different occasions to cool off. All employees were allowed to go outside to cool off when they wanted to. Mr. Wimmer did not realize the heat in the place where they worked these two hours was so intense. He did not know it was so hot in there until after he took the temperature.

At about twenty minutes to four o'clock, they completed the work on the expansion joint and Mr. Beamer handed the tools through this panel opening to Mr. Wimmer. Mr. Wimmer went on to put up the tools and Mr. Beamer then went on to the tool room where he fell and died about twelve or thirteen minutes to four o'clock. Two of The Virginian Railway Company doctors were called but were not available. However, later Dr. Newton, one of The Virginian Railway Company doctors, did arrive at the plant and viewed the body of Mr. Beamer. Dr. Newton testified that in his opinion, "the working in extreme heat that the extreme heat was the cause of his death." Dr. Carr, the other doctor of The Virginian Railway Company, was of the opinion that the intense heat and long hours of work played an important part in Mr. Beamer's death.

Quotations from Evidence Supporting the Foregoing Facts.

Mr. Bowser, the General Foreman, testified (R. 118), "I would tell him (Mr. Beamer) where a leak or change should be made and he would go ahead and do it." Mr. Bowser also testified (R. 120), that Mr. Beamer reported to him that he found a large expansion joint broken in turbine No. 1; that if he, Mr. Beamer, repaired the joint he would have to work overtime; that it would take him longer than four o'clock to finish it. He, Bowser, directed Beamer to get a new joint so that he could finish by four o'clock.

Mr. Wimmer testified on cross examination (R. 56):

> "Q. It was Mr. Beamer's own idea to finish it, was it? There was nobody pressing him to finish it, was there?
>
> "A. I don't know who told him, but he told me that he had to finish it by quitting time at 4:00 o'clock."

Mr. Wimmer (R. 59) testified that Mr. Beamer could not work overtime without permission of Mr. Bowser or another foreman. Mr. Wimmer (R. 48-49) stated:

"Q. Did you and Mr. Beamer use that air hose that day?

"A. No, sir.

"Q. Had you ever used that air hose right in that particular place where you all were working on the expansion joint?

"A. No, sir, we never used the air hose up under there.

"Q. What was the condition of these pipes there at the place you were working, with reference to dust and filth?

"A. Well, it was dusty and dirty up in there, and these pipes were covered with this asbestos.

"Q. And dust would stick on them, would it?

"A. Yes, sir.

"Q. What would have been the effect, if any, of attempting to use that air hose in there where you were working on the expansion joint, with that condition with reference to dust?

"A. If you took the air hose and stuck them in there, and aimed to work there at the time, it would be so dusty, you could not do it. If you had time to take an hour or so to blow it out, it would be all right, but if you stuck it in there and would go in there to work, it would be so dusty, you could not stay in there.

"Q. Were you all the janitors in there?

"A. No, sir, we had a colored fellow that did the sweeping in the turbine room, but didn't nobody clean out or blow it under there.

"Q. Nobody cleaned or blew out the dust in this particular place where you were working?

"A. No, sir."

Mr. Bowser testified (R. 126-127) that the dust is blown off the machine when it is open for inspection; that the machines are open for inspection about every two years.

"Q. Did you ever inspect to see if it is kept clean during that time?

"A. No, sir."

HEAT.

Mr. Wimmer testified (R. 61) with reference to the place where he and Mr. Beamer were working:

"A. The pipes were hot up there.

"Q. How hot were they?

"A. They were so hot you could not touch them.

* * * * * * *

"Q. I believe you stated that it was 132 degrees Fahrenheit at the time you went there to take the temperature with Mr. Shands. Is that right?

"A. Yes, sir.

"Q. Was it any hotter at that time than when you quit working, to the best of your judgment?

"A. No, sir, it was not any hotter; I should say it was about the same."

Mr. Wimmer testified (R. 51):

"Q. At the time you and this other gentleman that you have named took this temperature—Mr. Shands—took the temperature and found it to be 132 degrees Fahrenheit, did you realize it was as hot in there as it actually was?

"A. No, sir; I knew that I was awfully hot, but I didn't know that it was that hot until we took the temperature.

"Q. Who was Mr. Shands?

"A. He is the electrical foreman there."

Mr. Wimmer further testified (R. 49):

"Q. What was the condition there in that place where you all were working at the time you took the temperature, with reference to the condition it was at the time you all were doing your work there and left that place?

"A. It was in the same condition, just like it was when we was under there."

Mr. Wimmer testified (R. 47):

"Q. What was the condition of his clothing with reference to perspiration or otherwise?

"A. It was wringing wet with sweat. I was hot and he was, too."

VENTILATION.

Mr. Wimmer testified with reference to the ventilation where he and Mr. Beamer were working (R. 44):

"Q. What was the condition of the ventilation in there at the time you all were working?

"A. Well, it was awfully hot in there. There was not much ventilation in there where we were working."

Mr. Bowser testified (R. 125):

"Q. Do you have a thermometer in the basement room?

"A. Not to measure the temperature of the air.

"Q. Do you ever measure the temperature of the air in the basement room?

"A. We never made any record of it.

"Q. Have you ever tested the air in there as to the quantity of oxygen and heat in the basement room?

"A. No, sir.

"Q. Have you ever measured the air and taken the temperature at the place where Mr. Beamer was working on the expansion joints?

"A. No, sir.

"Q. You knew it was a hot place, didn't you?

"A. Yes, sir.

"Q. And you knew in the summer that it would get extremely hot in there, didn't you?

"A. Yes, sir.

"Q. Did you, as foreman, ever do anything to cool the basement, such as putting exhaust fans in there?

"A. No, sir.

"Q. Did you ever recommend that that be done?
"A. No, sir."

Mr. Bowser testified (R. 132):

"Q. What makes the air circulate from the back of turbine No. 1 where there is no opening?
"A. It would not circulate unless you use some mechanical means to circulate it."

Mr. Fox testified (R. 156):

"Q. Mr. Beamer was repairing turbine No. 1, was he not?
"A. Yes, sir.
"Q. And there was no need to be efficient there, because it was shut down on that turbine?
"A. Yes, sir.
"Q. And there was no reason why he couldn't have sufficient ventilation, was there?
"A. No, sir."

Mr. Blake testified (R. 96):

"Q. And your idea is that there is no ventilation and that is derived from the fact that you saw the place up there in the pipes from down on the basement floor and you don't know what was above that place except what you were told. Is that right?
"A. My idea was that there was no ventilation and I saw no way for ventilation to get there."

IV.

The Questions Presented.

1—Do the facts in this case present a question to be determined by a jury, or only by the Courts?

2—Has the plaintiff been denied (relief) a substantive right given to her under the Federal Statutes known as The Federal Employers Liability Act?

3—Is the opinion of the Supreme Court of Appeals of Virginia, in this case, at variance with laws as established by the opinions of this Honorable Court?

4—Whether or not part of the opinion of the Supreme Court of Appeals of Virginia recognized that the doctrine of assumption of risk had been abolished, but in other parts of the opinion the Court still applied the doctrine of assumption of risk as well as contributory negligence. Quoting from the opinion: "He, (Beamer) knew the place was hot. The efficiency of the plant could not have been maintained and the heat eliminated. Employees are often called upon to work in places that are hot and dusty. It was not hotter where Mr. Beamer was working than is required by standards of good practice for such plants."

5—The Supreme Court of Appeals of Virginia erroneously held it to be the duty of the deceased to clean out the dust and dirt before going to work on the expansion joint; however, the undisputed evidence discloses it to be a fact that the deceased could not have completed his task and also cleaned out the dirt and dust within the time allowed by the Foreman to complete this specific task.

6—Whether or not the evidence of the plaintiff was ignored by the Court in its opinion wherein the Court held that there was no evidence of negligence on the part of the defendant.

V.

Reasons Relied Upon for the Allowance of the Writ.

FIRST:

The Circuit Court of Giles County, Virginia, erroneously set aside the verdict of the jury and entered up judgment for the defendant on the theory that the defendant assumed the risk of his employment, (R. 41, in Bill-of-Exceptions

No. 1). The said Circuit Court in effect held that the doctrine of assumption of risk had not been abolished as of the date of the injury on July 26, 1940.

The Supreme Court of Appeals of Virginia affirmed the lower Court, but on different grounds, holding there was non-negligence on the part of the defendant. This was error, and in conflict with the following decisions:

Tiller v. *Atlantic Coast Line Ry. Co.*, 87 Law Ed. Advance Opinions No. 8, p. 454;
Bailey v. *Central Vermont Ry. Co.*, 87 Law Ed. Advance Opinions No. 16, p. 1030;
Owens v. *Union Pacific Ry. Co.*, 87 Law Ed. Advance Opinions No. 18, p. 1221;
E. I. Dupont De Nemours & Co. v. *Brown*, 129 Va. 112, 105 S. E., 660;
Thacker v. *Klotz*, 175 Va. 267, 7 S. E. (2d) 883;
Turner v. *Richmond & R. R. Ry. Co.*, 121 Va. 194, 92 S. E., 841;
Lynchburg Traction & Light Co. v. *Gordon*, 123 Va. 198, 96 S. E., 195.

SECOND:

The Supreme Court of Appeals of Virginia erroneously held, in substance and effect, that evidence of general custom of a trade or business engaged in similar work, under like circumstances, is conclusive. We understand the law to be that evidence of general custom of a trade or business engaged in similar work under like circumstances is never conclusive, but is proper evidence to be considered along with all the other evidence, facts and circumstances in the case as to whether or not the defendant is guilty of negligence.

Roberts v. *Southern Ry. Co.*, 138 S. E., 658;
Texas & P. R. Co. v. *Behymer*, 189 U. S., 468.

THIRD:

The Supreme Court of Appeals of Virginia erroneously held that although it is disclosed by the evidence that the pipes to be repaired were dusty, that the ventilation around them was poor and that it was very hot, that these conditions do not constitute actionable negligence under the circumstances disclosed in this case.

We believe the uncontradicted evidence clearly shows that the place in which Mr. Beamer was required to work was dirty and dusty, with a temperature of 132° F., with practically no circulation of air, and that he was required to complete a definite task before four o'clock to prevent overtime work; that under such conditions it was physically impossible to clean up the dust and dirt and to perform the task within the time allowed by the Foreman. Any negligence of the defendant which caused or contributed in whole or in part to plaintiff's injury, is actionable negligence.

Washington & G. R. Co. v. *McDade*, 135 U. S., 554, 572, 34 Law Ed. 235, 241;

Wilkens v. *Davis, et al.*, 158 Va., 763, 164 S. E., 650;

Appalachian Electric Power Co. v. *Hale*, 133 Va., 416, 113 S. E. 711;

Thornton v. *Downes*, 177 Vt., 451, 14 S. E. (2d) 345;

Atlantic Coast Line v. *Wheeler*, 147 Va., 1, 132 S. E., 517;

Adams v. *G. C. Murphy Co.*, 174 S. E., 794;

Jones v. *Rhinehart & Dennis Co.*, 168 S. E. 482;

Depre v. *Pacific Coast Forage Co.*, 259 Pacific, 720;

Doney v. *Minn. Manfg. Co.*, 161 Minn. 240, 201 N. W., 305;

Hughes v. *Trustees St. Patrick's Cath.*, 156 N. E., 665.

FOURTH:

The Supreme Court of Virginia erroneously held that the other negligence complained of was either not sustained by the evidence or was not the proximate cause of the death of Mr. Beamer. The evidence is conclusive by two of the physicians of the defendant, The Virginian Railway Company, that performing hard, manual work in excessive heat caused the death of Mr. Beamer. All of the attending circumstances surrounding such employment, and every act of omission and commission must be considered together and not as separate, distinct, abstract fact or facts. The fact that the place was dusty and dirty, was extremely hot, that there was no ventilating system, that it was not inspected, that there was no means of testing the temperature or testing the air for oxygen or otherwise, and the fact that a definite task was to be performed, within a definite period of time, and evidence of the incompetency of the Foreman, must all be considered together, and the jury is the arbiter of all these questions.

Conclusion.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision and judgment of the Supreme Court of Appeals of Virginia may be made to conform to the decisions and principles announced by this Court, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Appeals of Virginia, and finally reverse it.

CARLTON CUSTER SANDERS,
Counsel for Petitioner.

STATE OF WEST VIRGINIA,
County of Raleigh, to-wit:

Carlton Custer Sanders, of Beckley, West Virginia, being first duly sworn, upon his oath says that he is a practicing attorney in the Supreme Court of the United States of America, having been duly admitted and qualified on the 15th day of February, 1934; that he is familiar with the facts set forth in the foregoing petition and record, and that in the opinion of this affiant, a writ of certiorari should be granted and that this Court should review the decision of the Supreme Court of Appeals of Virginia, and finally reverse it.

CARLTON CUSTER SANDERS.

Taken, subscribed and sworn to before me by Carlton Custer Sanders, this the 9th day of December, 1943, in my said County of Raleigh, State of West Virginia.

My Notarial commission expires October 5, 1950.

LEAH TONEY TRAIL,
Notary Public.

JAN 3 1944
CHARLES ELMORE CROPLEY

IN THE

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Versus

THE VIRGINIAN RAILWAY COMPANY, A CORPORATION, *Respondent*

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI, AND TO BRIEF FOR PETITIONER IN SUPPORT THEREOF.

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Of Counsel

December 30, 1943

HAMMOND'S PRINTING & LITHO. WORKS, ROANOKE, VA.

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The Petition for Writ of Certiorari should be denied for the following reasons: —

First: A failure to comply with Rule 12, paragraph 1, and Rule 38 of the Rules of this Court..... 1

Second: There was no federal question of substance raised in the State Court, which was decided adversely to the petitioner by that Court..... 4

Third: The evidence of record in this case supports the action of the State Court in holding that there was no proof of negligence on the part of the respondent..... 4

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REPLY BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI, AND TO BRIEF FOR PETITIONER IN SUPPORT THEREOF.

To the Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States: —

May it please the Court:

We submit that the petition for a writ of certiorari herein should be denied, for the following good and sufficient reasons:

FIRST: This is a petition for a writ of certiorari seeking a review of a state court judgment, and neither that petition nor the brief in support of it, specifies the stage in the proceedings in the court of first instance and in the appellate court, at which, or the manner in which, the federal questions sought to be reviewed were raised;

the method of raising them; or the way in which they were passed upon by the court; or pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. (Rule 12, paragraph 1, and Rule 38 of this Court.)

We believe that the omissions above referred to are easily accounted for by the fact that no federal question was raised by the petitioner in either the court of first instance or in the state supreme court which was decided adversely to her. As will appear from the record, no sort of federal question was raised by the petitioner and decided against her in the court of first instance. The case was tried in that court on the theory that the 1939 Amendment of the Federal Employees Liability Act did not apply to this case. This is evidenced by Instruction No. 3, found at page 172 of this record, which was given by that court without any objection or exception by the petitioner. So there was no federal question raised and decided adversely to her in that court.

After this case was completed in that court and pending its appeal to the Supreme Court of Appeals of Virginia, the case of Tiller vs. Atlantic Coast Line Ry. Co. 87 L. Ed. Adv. Opin. No. 18, page 1221 was decided by this court.

The claim that assumption of risk was not available as a defense in this case under the 1939 Amendment to the Federal Employees Liability Act was made for the first time by the petitioner in her "Memorandum of

Authorities" in support of her petition for writ of error to the state supreme court (R. p. 13, at p. 16)

The state supreme court might well have ignored that claim, then and in that way raised for the first time, on the ground that such question had not been raised and passed upon by the court of first instance and that it had not been specifically set out in the petitioner's Assignment of Errors to that court (R. page 8). Instead of doing that, however, that court, in view of the opinion of this court in the case of Tiller vs. Atlantic Coast Line Railway Co., supra, fully considered the question raised by the claim made by the petitioner in her "Memorandum of Authorities" and, in accordance with the opinion in the Tiller Case, held that the said 1939 Amendment had abolished the defense of assumption of risk in this case. The petitioner's claim in this respect was not decided adversely to her by the state supreme court. (Opinion of the state supreme court. R. page 177, at page 180 et seq.)

That Court, however, held that although assumption of risk was not available as a defense in this case under the 1939 Amendment, still the petitioner must prove, by a preponderance of the evidence, that this respondent had been guilty of some negligence which resulted in injury to the deceased. It quoted from the Tiller Case (R. page 181) and said:

> "There is nothing new in the test in the Tiller Case to determine when a case should go to the jury or when it should be withheld. For many decades this court has been announcing that disputed questions of fact are for the jury."

That court then proceeds with a fully considered review of the evidence and reaches the conclusion that

this respondent's defense of non-negligence has been sustained in that the evidence did not show any negligence on its part. This was the only question which was decided adversely to petitioner by that court. No question as to the state supreme court's right to pass on that question was raised, or could have been raised, by the petitioner. Nor do we understand that such a question is a federal question, or puts in issue any federal right. The right of courts to pass upon the sufficiency of the evidence, and to direct verdicts was upheld by this court in the recent case of Galloway vs. United States, 87 L. Ed. Adv. Opin. No. 16, page 1042.

SECOND: The only federal question of substance decided by the state court, viz.: that the 1939 Amendment to the Federal Employees Liability Act was applicable to this case, was decided in accordance with the opinion of this court in the Tiller Case. We submit that no one other than the parties to this case has any interest in its final outcome. That the public is not interested in the only question involved in it, and that no principle, or proposition of law, the decision of which will have any bearing upon any other case, is involved, (Rule 38, paragraph 5 of this court's rules.)

THIRD: The evidence of record in this case supports the action of the state supreme court in holding that there was no proof of negligence on the part of this respondent.

This proposition, of course, necessarily involves a consideration by this court of all of the evidence in this record.

We submit that such a consideration of the evidence will show the following as to the facts of this case: —

(a) In order to provide for the electrification of its line from Roanoke, Virginia, to Mullens, West Virginia, the defendent employed the firm of Gibbs and Hill of New York City to design, construct and supervise the construction of its electrical system, including the power plant at Narrows, Virginia. The standing of Gibbs and Hill in the profession as electrical engineers was very high, they having designed and constructed the most important high-tension electrification systems in the eastern part of the United States, including the electrification of the Pennsylvania Railroad from New York to Washington, the New York, New Haven and Hartford Railroad and the electrification of a portion of the Norfolk & Western Railway system and other important electrical projects for high-tension electrified systems of railroads. (R. pp. 117, 118, 145, 160.)

The plant at Narrows, Virginia, was completed and turned over to the defendant November 15, 1925. This plant is in a large building about 80 feet by 150 feet and consists of two stories, a basement room some 30 to 35 feet high, and a turbine floor room which is about 45 feet high. The basement room is below ground level and only a few feet of it is located above ground level. Just how much is above ground level is not shown. In it are located a number of pumps and other machinery. Its outside walls are of solid concrete and there is a brick partition between the basement room and the turbine floor room and the boiler room for the entire length of the building, cutting these rooms entirely off from the boiler room in which are located the furnaces and steam

boilers for the operation of the plant. In the turbine room there are located four large turbines which are used in the generation of electric power. The basement room contains the most of the piping necessary to conduct the steam from the boiler room to the steam turbine generators, all of which piping is covered with asbestos in order to prevent the escape of heat in the pipes leading to the turbines. This steam piping is against or near the ceiling of the basement room. The turbines stand on the floor of this turbine room and there are openings in the floor under each turbine through which the pipes supplying steam to the turbines extend up into the turbines. Between the four turbines there are two large openings extending from the basement floor to the top of the building. These openings are between turbines 1 and 2 and between turbines 3 and 4, and are each about 30 feet long by 18 or 20 feet wide.

Robert P. Beamer, the deceased, was employed by Gibbs and Hill as a pipe or steam fitter in the construction of the plant and in the installation of all piping in the building, including that which serves the turbines. Because of his familiarity with the piping and the work to be done in connection therewith the defendant, when it took over the plant from Gibbs and Hill, in November, 1925, employed Beamer as a pipe fitter. He was more familiar with the pipe layout than anyone about the plant, (R. page 149 and 118). He continued in defendant's employ as a pipe fitter from November, 1925, to the date of his death on July 26, 1940.

On account of the nature of the plant and the purpose for which it is operated, there are places in which the men employed have to work from time to time which are above normal temperature and at times are very hot. (R. p. 119). In order to make such places as comfortable as

possible for men who have to work therein, the defendant supplies a compressed air hose with attachments at convenient locations, so that the men, by the use of such hose, can bring about a circulation of air and thus reduce the temperature of such places. This was well known to the deceased, as well as to all other employees at the plant, and on various occasions Beamer had used the hose for this purpose. (R. pp. 119, 149). There also prevailed a custom at the plant which permits the men who have to do work in these hot places, to come out of such places to cool off, and under this custom the man who is doing the work is permitted to be the judge as to when he will come out for the purpose of cooling off. The matter of how often he will come out and how long he will stay out is left entirely to the discretion of the employees at the plant. (R. pp. 119, 121, 56, 59)

Beamer had entire charge of repairs and replacements to the steam pipes and he had one helper, Wimmer, who was employed as his helper for a period of about thirteen years. (R. pp, 55, 56, 118). The Superintendent of the plant would sometimes tell Beamer where a leak had developed or that a change should be made, and he would go ahead and make the necessary repairs or changes. When the repairs or changes were not familiar or were out of the ordinary routine, Beamer and the superintendent would talk the matter over and Beamer would then do the work. (R. pp. 118, 119). On the morning of Beamer's death the vacuum under turbine No. 1 was slightly low, that is, its efficiency was reduced, and the machine was shut down about seven-thirty, a. m., and not again put in operation that day. (R. p. 121). Bowser, the superintendent, told Beamer to correct this defect and he and his helper started to work on the turbine about noon of that day. They found that there was a break in a large expansion joint in the steam line,

which joint was located below the turbine floor and just below the ceiling of the basement room. Beamer got a new joint for the turbine from the store room and he and his helper proceeded to replace the broken joint with the new joint. (R. P. 120). In order to get at the place where the work was to be done, they removed a plate 28 inches by 50 inches from the side of the turbine and above the turbine floor and the helper, Wimmer, went down to the place of work through that opening. Beamer went down on an elevator from the turbine room to the basement floor and then climbed a stairway from the basement floor about 30 feet up to a landing near the place where the work was to be done. While doing the work they stood on a temporary platform across steam pipes. (R. pp. 44, 45). It took them about 2½ hours to complete the job. While doing the work they did not use the compressed air hose, although it was convenient for use had they desired to use it. (R. pp. 48, 49, 55, 56). They did come out from the place at least twice for the purpose of cooling off. (R. p. 45). After they finished the work, Wimmer came out through the opening in the side of the turbine and Beamer handed him the tools with which they had been working. Then Beamer went down the stairway to the basement floor and came up the elevator to the turbine room. Then he walked through that room some 140 to 150 feet and sat down on an outside platform at the far end of that room for a short time. He then walked into the machine shop on the same floor, a distance of about 80 feet, and died suddenly while he was standing in that shop. The work that Beamer and his helper did on that day was nothing new or out of the ordinary, (R. page 52). During the 15 years that he worked as pipe fitter at the plant, the job of changing joints under some of the four turbines, all of which were of the same construction, would occur about once every

three to six months. Very few days went by that Beamer did not have to get under the turbines to do some work, (R. page 121). A short time before the day Beamer died, he and his helper had brazed or repaired a crack in the same expansion joint which they replaced that day, (R. pp. 54, 59-60). An hour to a hour and a half after the death of Beamer the temperature of the place they were working was taken and found to be 132° F. Prior to the taking of the temperature no one about the plant knew what it was. As to the foregoing facts, there can be no controversy or dispute.

(b) The claim is made by the ~~respondent~~ petitioner that the deceased, Beamer, was required by the plant superintendent to finish the installation of the new expansion joint in the pipe by four o'clock in the afternoon of the day he was making the installation. In making this claim petitioner relies solely upon the statement of the witness, Wimmer. That witness stated that Beamer said he "wanted" to finish that work on that shift (i. e. by 4:00 p. m.) (R. p. 45); and, on R. p. 56, that Beamer said he had to finish by that hour. No witness testified that the superintendent instructed him to complete the work by 4:00 p. m. On the contrary, the superintendent testified that he gave Beamer no orders to that effect, that there was no necessity for finishing that work that day; and that the only reference to 4:00 was made by Beamer when he said that if the joint was repaired instead of being replaced the job could not be finished by 4:00 p. m. (R. pp. 121, 122)

(c) The accumulation of dust under the turbine being repaired and the time required to remove this dust so that the air hose could be used in doing the work in which Beamer and Wimmer were engaged are sought to be established for the purpose of excusing Beamer from

using the air hose for the purpose of cooling off the place in which the work was being done. The whole of the testimony of Wimmer, on whose statements these facts are sought to be established, shows that there is no merit in these contentions. The testimony of the superintendent, Bowser, if read as a whole, shows also that these contentions are without merit, and that it was left entirely to the discretion of Beamer to take the necessary precautions to make the place safe for the work to be done therein. On page 126 of the Record, Bowser, referring to the matter of cleaning the dust from the piping by blowing with the air hose, stated: — "Q. Who does that blowing? A. Usually the pipe fitters would do that."

The only pipe fitters at the plant were Beamer and his helper, Wimmer. These pipes were located next to the ceiling of the basement room which was approximately 35 feet in height, and the only employees at the plant who had any work to do on those pipes or any occasion to be about them were Beamer and Wimmer. If it was necessary to remove the dust from them it was the duty and responsibility of Beamer alone to do that. This even though it might have required an hour or more to remove the dust. He had plenty of time to do it. There was no reason that the repairs to the piping had to be finished by 4:00 p. m. that day (R. pp. 120, 121). There were four turbines in the plant and three would take care of the load (R. pp. 121, 122). The mere fact that there may have been dust on the pipes affords no excuse for Beamer's failure to use the air hose to improve the condition of the air in the place where he worked. It was also his duty to take other precautions for his own safety, in that it was left entirely to his discretion as to how often he would come out of the place in which he was working for the purpose of cooling off and how long he would stay out for that purpose. Under these circumstances he

cannot recover on the alleged ground that the place of work was in an unsafe condition for the work to be done. L. & N. Ry. Co. vs Williams (Ky.) L. R. A. 1915 E. 613, 165 Ky. 386; 39 C. J. Section 965 (f) p. 766, ibid note 46, 46 (a); L. & N. Ry. Co. vs McCoy (Ky.) 110 S. W. (2d) 433; Davis vs C. & O. Ry. Co. (Ky.) 179 S. W. 422; Grosscup vs C. & N. W. Ry. Co., 14 Fed. Supp. 276; Grammer vs Mid Continent Petroleum Co. (C. C. A. 10th.) 71 Fed. (2d) 38; C. & O. Ry. Co. vs Butler, 177 S. E. 195, 163 Va. 626.

(d) Also the principle that an employee is necessarily the best judge of his own strength and power of endurance, and if injury to him results from his failure to correctly judge his own strength and power of endurance the employer cannot be held liable on the theory that there was negligence on its part, seems well established. L. etc. Ry. Co. vs Sawyer, 169 Ky. 671, 675, 184 S. W. 1123; Lloyd vs N. & W. Ry. Co., 151 Va. 409, 145 S. E. 372, 376; Lang vs N. S. Reduction Co. (C. C. A. 7th.) 110 Fed. (2d) 441; Swieg vs C. M. & St. P. Ry. Co. 216 Fed. 750, 753. Under these authorities it seems clear that if Beamer was adversely affected by the heat it was because he overtaxed his powers of endurance, and the respondent cannot be held liable on the theory that negligence on its part has been established which, under the law, entitles the petitioner to recover.

This principle of law is especially applicable to this case in view of the fact that, during the entire 15 years that the plant had been in operation under the same condition it was in the day of Beamer's death, and during which time work similar to that which Beamer was doing on the day of his death was prformed by him every three to six months, no employee at the plant had ever

been injuriously affected by the heat. (R. pp. 58, 122, 148).

The respondent was not required under the law to foresee and guard against casualties which were not reasonably to be expected to occur, and which could not have been reasonably anticipated in the exercises of ordinary care. Wyatt vs C. & P. Tel. Co. 158 Va. 472, 82 A. L. R. 396; Southern Ry. Co. vs Bell, (C. C. A. 4th.) 114 Fed. (2d) 341, 343; B. & O. Ry. Co. vs Carroll, 280 U. S. 491, 74 L. Ed. 566.

(e) The respondent's plant was properly designed, equipped and operated. The undisputed evidence given by men who had wide and varied experience in the construction and operation of and acquaintance with, such plants, shows that to be a fact, and especially with relation to that part of this plant at which Beamer worked on the day of his death. (R. pp. 129, 136, 147, 160, 161). The petitioner bases her claim of defective construction of the plant in that there were no windows in the basement room and no mechanical ventilation system was installed in the plant. The evidence shows that it would have been impracticable and unsafe to have put windows in the walls of that room. Practically that entire room is below ground level. The plant stands on the bank of New River and any windows which might have been put in the walls of the basement room would have subjected the basement to the grave danger of flooding the entire basement in the times of flood waters in the River. Such windows would be below flood level (R. pp. 131, 148, 154). If such windows had been put in the basement walls, or if a mechanical ventilation had been installed, and if the effect thereof had been to reduce the temperature around the turbines where Beamer worked, that would have reduced the efficiency of the operation of the

turbines. (R. pp. 133, 147, 152, 154). This evidence is not disputed.

Of the large number of such plants with which the witness Reich was familiar, no one of them had windows in its basement (R. p. 164); nor was there any arrangement for mechanical ventilation or otherwise in that part of the equipment under the turbines where Beamer worked. (R. 161).

The customary practices and usages as to plant equipment, machinery and methods of operation are determinative of the question of negligence as applied to any particular line of business, especially where there is no evidence to the effect that different practices and usages prevail in any similar line of business that are shown by the evidence to be safer or more suitable. The undisputed evidence is that no different practices and usages have been adopted in the construction and operation of power plants similar to that of respondent, Southern Ry. Co. vs Lewis, 113 Va. 117; Southern Ry. Co. vs. Chadwick, 144 Va. 443, 452; C. & O. Ry. Co. vs Butler, 163 Va. 626, 177 S. E. 195. Furthermore the standards in respect to the engineering, architectural, mechanical and other scientific questions as to plant methods of operation are not to be left to the uncertain and varying judgments of juries. Toledo etc. Co. vs Allen, 276 U. S. 165, 72 L. Ed. 513, 516; Southern Ry. Co. vs Verelle (C. C. A. 4th.) 57 Fed. (2d) 1008; Sumney vs Southern Ry. Co. (C. C. A. 4th.) 89 Fed. (2d) 437; B. & O. Ry. Co. vs Groeger, 266 U. S. 521, 69 L. Ed. 419; Crosswhite vs Southern Ry. Co., 181 Va. 40, 46.

If juries were allowed to establish standards with respect to such questions, for instance as to whether a plant of the nature of the large and complicated power

plant of the respondent was properly constructed and operated, an intolerable situation would be presented. In such cases the standards in such matters would vary according to the peculiar temperaments and views of juries trying each case, and there would be no fixed rule applicable to all cases that might be submitted to the determination of juries.

SUMMARY

In this case we have a man (Mr. Beamer) who had taken part as a pipe fitter in the installation of the piping system in this large power plant when it was constructed. When the plant was completed and turned over to the respondent in 1925, the respondent employed him to work for it in the same capacity as pipe fitter, especially because of his familiarity with the piping system in this plant, and with the work to be done in connection therewith. He was placed in charge of the pipes and the work to be done in connection therewith, and he and his helper did all of the work that was done in connection with those pipes. This continued for a period of fifteen years, and during that period, every three to six months he and his helper performed the same sort of work under the same conditions that they did on the afternoon of the day of his death. He was allowed to be his own judge as to when and how often he would go out of his place of work for the purpose of cooling off, and as to how long he would stay out for that purpose, and as to whether he would use the air hose for improving conditions in his working places. This without any interference by the superintendent. During all of that period neither he, nor his helper who worked right along with him, nor any other person had been injuriously affected by the heat.

We respectfully submit that, under the circumstances of this case, the petition for a writ of certiorari should be denied.

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